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In the Supreme Court of the United States

October Term, 1984

LISA LITCHFIELD,

Petitioner,

vs.

STEVEN SPIELBERG; MCA, INC.; UNIVERSAL STUDIOS, INC.; EXTRA-TERRESTRIAL PRODUCTIONS; KATHLEEN KENNEDY; NED TANEN; and MELISSA MATHISON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Was it the intention of Congress under the language of the new Copyright Act of 1976 in Sections 101, 106(1), 106(2), and 501(a), to make a clear distinction between the reproduction right and the derivative right, thus recognizing that infringement of a derivative use is entirely different and requires the application of a new standard to prove infringement?

2.

Whether it is a violation of the due process clause of the United States Constitution for a judge, in open court, to deny plaintiff's motion for summary judgment admitting that she had not read the evidence while at the same time taking defendants' motion under submission, and then granting said motion, and then again, the Court of Appeals in what it termed a de novo hearing refusing to review all of the evidence submitted to the lower district court.

3.

Did the lower courts abuse the summary judgment technique in this copyright infringement case by granting the defendants' motion when there were many similarities between the two works, admittedly above stock scenes, thus demonstrating that defendants did not sustain their burden of proof under Federal Rule 56 (that defendants must demonstrate that there are no material triable issues of fact and that the case is meritless), and therefore depriving plaintiff of her constitutional right to trial by jury?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The July 6, 1984 opinion of the Court of Appeals is reported at 736 F.2d 1352 (1984) and is set out in Appendix A to this petition. The June 16, 1983 Memorandum Opinion of the United States District Court for the Central District of California is officially unreported and is set out in Appendix B to this Petition.

JURISDICTION

A petition for rehearsing was denied on September 28, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The filing period for obtaining a Writ of Certiorari is ninety (90) days from entry of judgment. 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, clause 8 of the United States Constitution provides in pertinent part:

> "The Congress shall have the power...to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

5th Amendment
No person shall be "deprived of life, liberty, or property, without due process of law."

7th Amendment
"The right of trial by jury shall be preserved..."

STATUTES INVOLVED

Pub. L. No. 94-553 (October 19, 1976), 17 U.S.C. Section 101 *et seq.*, effective January 1, 1978.

STATEMENT OF THE CASE

Petitioner is an author and playwright. On August 3, 1982, she commenced an action for copyright infringement against the named defendants. A Lanham Act violation was alleged as well as pendent state claims. On June 16, 1983, a Judgment was entered against Petitioner and on July 13, 1983 a timely Notice of Appeal was filed with the United States Court of Appeals for the Ninth Circuit. On July 6, 1984, the Court of Appeals rendered its opinion affirming the Judgment below.

INITIAL BASIS FOR FEDERAL JURISDICTION

Jurisdiction of the federal courts was based on 28 U.S.C. §1338(a) and §1338(b).

REASONS FOR GRANTING THE WRIT

This writ is prompted by the new Copyright Act of 1976 and seeks this high court's interpretation of this new act. It is

Petitioner's contention that congress' intent was to make a clear distinction between the reproduction right and the derivative right. No court has yet realized that infringement of a derivative use is entirely different from infringement of a reproduction right. The new act of 1976 contains a broad and expansive definition of a "derivative work" which specifies nine examples and any other form in which a work may be recast, transformed or adapted." In order to be an infringement, the derivative work must be "based upon" the copyrighted work. In other words, the derivative work must "incorporate the copyrighted work *in some form*. This right allows the author to exercise creative expansion of his work, thus recognizing the important economics of the copyright incentive—which is to encourage and attract investment in the work itself. The author has the exclusive right to prepare derivative works from his original work and more often than not, others infringe that right with impunity. Congress recognized the accelerating technologic developments in communications and that the law would have to be flexible enough in a modern framework for growth and change. As Barbara Ringer noted: "Through foresight, not ignorance, the 1976 legislators consciously left certain issues open for further interpretation or later consideration." The salient issue in this case is to define what constitutes infringement of the right to prepare derivative uses.

This case also raises the important question of the standard of review to be applied when analyzing a copyright claim. The lower courts traditionally required three elements of proof by the plaintiff: ownership, access and substantial similarity. The Krofft decision, prior to the new act, announced an additional test bifurcating idea and expression. The Court of Appeals in the instant case, added an additional element: now the court would determine whether there is substantial similarity in the expression of the idea as a matter of law, thereby circumventing the right to trial by jury and determining "protectibility of expression" by unilaterally analyzing the "ideas" and the "quantum of expression." This standard of review mischaracterizes the law. Justice Hugo Black warned that "...the idea of summary judgments as time savers is a snare and delusion and the best service that could be rendered in this field would be to abolish summary judgment procedures, root and branch." A motion for summary judgment cannot be entrusted to the discretion of a trial judge. If there is a genuine issue, the motion cannot be granted.

The primary emphasis of the new Copyright Act of 1976 is to protect creative people, the artists who are less than ten percent of the population even though their resources create all of our communications. The outcome of this case will affect each and

every one of these artists in this nation. They conventionally work under hardships wherein they must first create and then *hope* for financial remuneration; and now, with the ever-increasing threat of plagarism and a lack of protection of their primary property, the fate of the profession is at stake. This, in turn, effects the entire Entertainment Industry which is in dire need of revitalization.

SUMMARY OF ARGUMENT

I. The plain meaning of the statutory language should be followed.

The 1976 Copyright Act (hereinafter "new Act") significantly modernized copyright law. It also distinguished the reproduction right from the derivative right.

This case concerns the meaning of a carefully drawn statute, ignored by the District Court, given scant attention by the Court of Appeals, and explicitly condemned as frivolous because petitioner sought to have her cause decided under the language of the new Act.

The district court did not address this issue but the Court of Appeals, in what it termed a *de novo* review, suggested that a work is not derivative unless it infringes the reproduction right §106(1).

Petitioner alleges that the new Act advances expansionary trends in protected rights and accommodates the bundle of rights explicitly granted to authors. Derivative rights concern not only authors but diverse interest groups as well. The Congress which drafted the new Act did so in express recognition of a broad definition of a derivative work. Simply stated, a work is a derivative work if it is based upon one or more pre-existing works.[1]

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[1]To be "based upon" a pre-existing work, a derivative work must incorporate in some form a portion of that pre-existing work. The reason is that copyright protection extends to the tangible fixation of the expression of ideas in a pre-existing work, and not to the ideas themselves. 17 U.S.C. 102. The direct focus of this case is the application of a single sentence, the definition set out in §101 as it pertains to §106(2) and §501(a). In approaching the task of construction, these sections must be read in accordance with the overall purpose of the entire act — equal protection for authors and a little less leeway for defendants' privileges. It is a balancing act with more recognition of plaintiffs' rights. In 1970 one judge defined "based upon" as something which recognizes varying levels of creation. Judge Reppy said, "Probably the similarities would not have to be as pronounced..." *Fink vs. Goodson-Todman Enterprises, Ltd.*, 9 Cal. App. 3d 966, 88 Cal. Rptr. 679. The exclusive right to prepare derivative works is a strong indication of congressional intent that "derivation" be employed as the standard of copyright infringement. In addition, the alternative

The new Act provides a copyright owner with a number of different rights. They are the exclusive right (1) to reproduce the WORK in copies; (2) to prepare derivative WORKS based upon the ORIGINAL WORK; (3) to distribute copies; (4) to perform the WORK publicly; (5) to display the WORK publicly. 17 U.S.C. §101.

The derivative right, according to the House Report on §106, overlaps the reproduction right to some extent. H.R. Rep. No. 94-1476, 94th Congress, 2d Sess. p. 62 (1976); 17 U.S.C. page 101 (hereinafter referred to as "House Report"):

> "It is broader than that Right, however, in the sense that reproduction requires fixation in copies...whereas the preparation of a derivative work...may be an infringement even though nothing is even fixed in tangible form."

The House Report makes clear that the question to be asked in determining if a work is derived from a copyrighted work is whether or not the later work is based upon the original:

> "...the definition in §101 refers to 'a translation...dramatization, fictionalization, motion picture version...abridgement, condensation, or any other form in which a work may be recast, transformed or adapted.'"

This language is clear, unambiguous, and quite apparently an expression of legislative intent. To be a derivative work, the second work must be based upon the original. The language is enlightening in light of past judicial decisions which have attempted to face it.

> "'Based upon' does seem to be something a little different than having substantial similarity...the varying level of creation is clearly recognized.'"

Fink vs. Goodson-Todman Enterprises, Ltd., 9 Cal. App. 3rd 996, 1008; 88 Cal. Rptr., 679 (1970).

The next sentence in the House Report strengthens this view:

> "Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work *in some form*."
> (p. 62; 17 U.S.C.A. at 101; emphasis added.)

Hence, to constitute a violation of the derivative right, the second work will be based upon the original work and will have recast,

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recovery theories under the old Act were simply a "make-shift" for the old Act's failure to function in a large portion of its intended area. The new Act, however, is surprisingly efficient as it is total in its spectre of preemption. Economic and literary reality require that authors be protected in their writings *in toto* by the Copyright Act itself.

transformed or adapted it into another form. This is the language of the legislature that wrote the Act. The statute is intelligible and sensible when its plain mandate is observed.

Contrasted with the above is the language of the House Report in explaining infringement of the reproduction right. § 106(1).

> "A copyrighted WORK would be infringed by reproducing it in whole or in any *substantial part*, and by duplicating it exactly or by imitation or simulation."
> (House Report, page 61; 17 U.S.C.A. at 101; emphasis added.)

The Congress clearly recognized the distinction between the derivative right and the reproduction right.

Ultimately, the Court of Appeals ignored Congress' intent. Its basic objective was to perpetuate the *status quo ante* of extreme privilege to defendants. On the other hand, the Congress has shown a very special concern for authors by distinguishing those bundle of separate rights.

The reproduction right and the derivative right are not the same.[2] If these two rights are not distinguished by this Supreme Court, then the derivative right will be lost as it is construed out of existence, becoming only an ignored adjunct of the reproduction right. This important part of the new Act must not be so disregarded.[3]

II. *The new extreme substantial similarity test of the Ninth Circuit (an "identity test") based on differences between works rather than similarities is not the standard applied to works of fiction and finds no support in law anywhere in the nation, neither in Congress nor in the Courts. It is a harsh variant of the lay*

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[2]It is difficult to understand why the leading commentator on copyright law concludes that the grant of the right to prepare derivative works is superfluous, effectively replicating the right to reproduce and the right to perform. 2 M. Nimmer, Copyright §8.09[A](1981). Another commentator blames the Courts for failing to draw a "principled line capable of separating derivative rights from reproduction rights." 30 J. Copr. Soc'y, Goldstein, *Derivative Rights and Derivative Works*, at 215 (1983). Professor Goldstein comments on the handful of cases which have attempted to deal with the distinction's full implications.

[3]In all fairness to the Ninth Circuit, some justification for its disregard for § 106(2) can be attributed to Nimmer's lead. In his treatise on copyright law more than twenty years ago, Professor Nimmer defined a derivative right as one which is substantially copied from a prior work. Happily, the Congress in 1976 did not adopt his definition. This also explains his total disregard for § 106(2) as the replication of § 106(1). Whereas Nimmer saw no distinction, Congress explicitly did.

observer test which extreme identity is an impossible burden to meet and effectively takes the heart right out of the statute.

This new 'identity test' is so extreme that an author has virtually no protection. The Ninth Circuit's new test is a dangerous precedent and no author is safe unless the accused work is an exact duplication. The decision in *Litchfield* is the logical extension into fiction of the holding in *Landsberg vs. Scrabble Crossword Game Players, Inc.*, Nos. 80-6083, 82-5467, 82-5504, ___ F.2d ___, ___ (9th Cir. 1984). This case followed the lead of the 2nd Circuit decision in *Hoehling vs. Universal City Studios, Inc.*, 618 F.2d 972 (1980), wherein minimal copyright protection is afforded to works of history even in a fictional context. Thus, to apply an extreme substantial similarity test to works of fiction as was done in works of fact like *Landsberg* and *Hoehling* is a reactionary departure from tradition and a perversion of the law.

The Ninth Circuit's extreme interpretation of the substantial similarity test would require a virtual identity as to both ideas and expression. The Circuit, in an uninterrupted string of cases, has held that unless *both* prongs of the Krofft test are met, the jury will not be permitted to decide the infringement issue. This approach not only invades the province of the jury but risks elimination of any copyright protection for any work unless the accused work is an exact copy of the original. By focusing solely on the differences, the new test requires virtual identity or extreme substantial similarity. This test undermines the whole copyright scheme.

Prior to the enactment of the new Act, once ownership was established, the test to prove infringement was to show *access* and *substantial similarity*. Assuming access, if there was substantiality of ideas, then the trier of fact would decide substantial similarity of the expression of those ideas. Thus, a two-step process was required. The Court, however, could determine the works were similar and usually for illustrative purposes only, and, as an aid to the Court, the plaintiff would demonstrate that issue by compiling a list of similarities between the accused work and the plaintiff's work. Once the Court was satisfied that there were sufficient ideas common to both works, then the trier of fact was permitted to determine the extent of the similarities in expression. The test was derived from *Arnstein vs. Porter*, 154 F.2d 464 (2nd Cir. 1946) and is still good law. The case of *Sid & Marty Krofft Television Prods. Inc. vs. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) reaffirmed *Arnstein* by stating that only a trier of fact should decide the issue of similarity of expression. *Krofft* extensively quoted *Arnstein* and specifically stated, at page 1165, that, (except for one remark), *Arnstein* has been "accepted by other Courts, that its tests "have consistently been approved by this Court," and that it is "still

good law."

The Ninth Circuit's wide departure from *Krofft* is inexplicable in *Jason vs. Fonda*, 698 F.2d 966 (9th Cir. 1983). The requirement that both prongs of the *Krofft test* be satisfied is in conflict with *Krofft supra* and Twentieth Century Fox Film Corp. vs. MCA, Inc., 714 F.2d 1329 (9th Cir. 1983), and with its own statement that if triable issues of similarity of ideas are found, a trier of fact—not a court deciding only issues of law—is who must decide the issue of similarity of expression.

The point that cannot be stressed strongly enough is that the Court must be looking for a triable issue of fact. That is, the issue is whether reasonable minds could differ, and, if so, the issue should be resolved by way of trial. *Jason*, with its new test, no longer allows authors to go to trial even where the ideas are similar. Instead, the Court, in its newly acquired role, may step into the shoes of the trier of fact and decide that fact *pro tanto*. *Overman vs. Universal City Studios, Inc.*, No. 82-3604 (C.D. Cal. 1984).

The Court below committed an error so gross in its implications that it must be corrected immediately. The moving defendants below were not entitled to summary judgment because a genuine issue of material fact had been shown. This is so because a dispute of fact is "material" when it "affects the outcome of the litigation" and is "genuine" if manifested by "substantial" evidence "going beyond the allegations of the complaint." *Pignons S.A. de Mecanique vs. Polaroid Corp.*, 657 F.2d 482, 486 (1st Cir. 1981). In filing their motion, respondents assumed the burden of demonstrating that there were no genuine issues of material fact. Certainly the significance of the similarities is material because a too narrow test or an improper analysis of the evidence will adversely affect the outcome of litigation not only in this case but in all cases that follow in the Ninth Circuit and elsewhere.

Finally, if it is true that a work is a derivative work only if it is substantially different from the original or grossly different, as has been held in *Gracen vs. Bradford Exchange*, 698 F.2d (7th Cir. 1983)—then, on balance, if a work must be substantially similar to constitute infringement yet at the same time be substantially different to qualify for its own copyright—where, then shall the line be drawn on this conflict—especially where a later derived work is transferred to the screen? E.T. is substantially similar in its "essence" and "structure" to *Lokey* yet at the same time it is substantially different in some minor details. With authority from the author of *Lokey*, E.T. could have qualified for its own copyright since defendants had *changed enough* to qualify for same. Thus E.T. is the new Act's exemplar of derivation without consent, to-wit: a derivative work is an "infringing" work if it is prepared

without the consent of the author and is "based upon" a prior work or works. Consent to prepare a derivative use is an absolute requirement of the law where "potential uses" are concerned. The preparation right is just such a potential use protected by the law.

III. *Where a civil jury trial is called for, the Court on a summary judgment motion may not weigh the evidence so as to deprive the litigant of the right to trial by jury or due process of law.*

The vast majority of copyright cases in recent years have been tried to a court without a jury. Under such circumstances where trial by jury is not demanded, a judge is in a good position to draw certain inferences without resort to trial. In a copyright case, a judge may be warranted in concluding that no reasonable jury could conclude that the works are substantially similar under the "intrinsic" test of *Krofft, supra*, because he is in a position to do so. But where, as here, a jury is called for, the litigant is entitled to have a jury draw certain inferences or conclusions. Only if there is "a complete absence of probative facts" to support a particular inference, *Planters Manufacturing Co. vs. Protection Mut. Ins. Co.*, 380 F.2d 869, 874 (5th Cir. 1967), may the Court bypass the jury. Or, if "reasonable men could not arrive at [but one] verdict," then summary judgment is proper. *Boeing vs. Shipman*, 411 F.2d 365, 374, (5th Cir. 1969). Thus, where the evidentiary facts are not disputed, a *court* in a non-jury case may grant summary judgment if trial would not enhance the ability to draw inferences and conclusions. But summary judgment is not appropriate if the same case is to be tried to a jury especially where, as here, the inferences to be drawn are genuinely disputed. For example, a list of unique and striking similarities was carefully prepared to show essential similarities between the works in their proper sequence so as to avoid a charge of abstraction or exaggeration, *infra*, footnote 5. The Court admitted in its opinion that "in the past" it had "relied on such lists of similarities" which in fact do exist and cited *Twentieth Century Fox*, 715 F.2d at 1329 n.5, but that in *Litchfield* they would be cautious where "the list emphasizes random similarities scattered throughout the works." The Court cited *McMahon vs. Prentice Hall*, 486 F. Supp. 1296, 1304 (E.D. Mo. 1980), and justified use of a standard applicable to factual works as if it were the test for all works. This is clearly erroneous.

The Court also erred when it conceded the list of similarities and then denigrated its importance by weighing the inferences to be drawn by declaring that the carefully prepared list, unique to *Lokey* and literature, was "inherently unreliable." *Litchfield*, 736 F.2d, at 1356. While the Ninth Circuit's inference may be conceivable, it certainly is not one that a jury would be compelled to draw.

The Supreme Court of the United States has already held that on a motion for summary judgment a court *must* draw the inference most favorable to the party opposing the motion. *United States vs. Diebold, Inc.*, 369 U.S. 654, (emphasis added).

In this instance, the Petitioner had a right to all reasonable inferences in her favor. Instead, the inferences were presumed in favor of defendants. The question decided unfavorably against petitioner was whether plaintiff's work constituted a "protectible expression of ideas." The Ninth Circuit improperly held that petitioner's "expressions" cannot sustain a copyright as a matter of law. As a matter of fact, the Court does not contend that the similarities do not exist, but only that the similarities as do exist are merely at the "general level." *Litchfield*, 736 F.2d 1352, at 1357. The Court erred as a matter of law. It assumed that the abstract idea of aliens landing on Earth, befriending children and engaging their assistance to return home includes the treatment of that idea as well. If an idea is merely something in an undeveloped state, then the development of that idea is its expression. Thus, anything in addition to the basic idea that the works have in common is necessarily in the area of expression. If the Ninth Circuit's reasoning is accepted by this Court, a plagiarist could always avoid liability merely by describing a plaintiff's work in great detail and then labeling that description the 'idea' of plaintiff's work. The 'idea' of any work could always be defined in such detail that the description of the expression would add nothing new to the idea, thus allowing a defendant to engage in all but verbatim copying. See *Midway Mfg. Co. vs. Bandai-America Inc.*, 546 F. Supp. 125 (1982).

With the idea of petitioner's play once identified, it becomes clear that petitioner's copyright merits protection. The idea of petitioner's play is relatively simple. It is the story of two little lost aliens, marooned on Earth, and helped by children in their efforts to get back home. Thus, in expressing their version of the same idea, it was not necessary for respondents to mimic petitioner's expression of this idea, which involves such elements of expression as are listed and described in this brief in footnotes 5 and 17, *infra*. Respondents can say what they will, but the work is what it is. Respondents did not "buy it" from Litchfield. They either "created it" independently, or they did not. Respondents admit having received the copyrighted work and have conceded the issue of access.[4] Respondents have not proven independent creation. They have merely denied that the similarities are of any consequence. They have been labeled "general ideas," and therefore, not the subject of copyright. This narrows the law beyond all reason. It destroys the Copyright Act; it makes a mockery of it; it creates

intolerable uncertainty for every author in this nation. Indeed, the new Act giving authors specific exclusive rights to their works has not been given the reasonable application intended by Congress and has become totally ineffectual, especially where, as here, giant corporate interests and profits are at stake.

ARGUMENT

I. The Plain Language of the New Copyright Act of 1976 Presents a Straight-forward Question of Statutory Interpretation Which Failure to Apply Distorts the Federal Copyright Scheme.

The unsoundness of the Court of Appeals' opinion is readily apparent when Section 106(2) of the New Act is viewed in conjunction with § 106(1) and 101 which defines a derivative right. The rights and obligations created by the Act should be followed in accordance with its plain meaning. The lower Courts failed to focus on either the meaning of the statutory words or their significance in the context of the new Act.

(a) *The Derivative Right and the Right to Copy Under the New Act.*

As between the derivative right and the right to copy, one commentator has said:

> "It is that point at which the contribution of independent expression to an existing work effectively creates a new work for a different market."

Goldstein, Derivative Rights and Derivative Works in Copyright, 30 J. Copyright Soc'y U.S.A. 209, 217 (1983).

Professor Paul Goldstein of Stanford University has succinctly proposed a new standard for measuring infringement of derivative rights.

(b) *The New Act Requires a New Standard for Measuring Infringement of Derivative Rights.*

According to Goldstein, infringement will necessarily differ from the measure employed in cases involving reproduction rights: "Yet

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[4]Since respondents initially did not desire to dispute access, preferring instead to waive that right, this dispute concerns unfair use of the copyrighted work. The real question is whether, having access, the defendants have made an unfair use of a sufficient amount of the plaintiff's copyrighted matter to justify trial by jury on the question of infringement. Once access is no longer in issue it is always a "fair use" question. See *Shipman vs. R.K.O. Radio Pictures*, 20 F. Supp. 249.

virtually none of the decisions has drawn a principled line capable of separating derivative rights from reproduction rights, and only a few have systematically addressed the distinction's full implications: How, specifically, must infringement tests be modified to meet the peculiar needs of derivative rights? The answer to this question is in the Act itself. Since the new Act expanded the right to prepare derivative works to ALL forms of copyrighted works, his argument is that, taken together §§ 102(a): works of authorship, 103: derivative work, 106(1): reproduction rights and 106(2): derivative rights, have created an *economic incentive* which he describes as a continuum that "may stretch from an underlying novel or story to the works' adaptation into a motion picture, its transformation into a television series, and the eventual embodiment of its characters in dolls, games and other merchandise." Thus, the Act's broad endorsement of derivative rights may be a signal that Congress intended a different standard to control where necessary to give effect to derivative rights. It is not to say that the standard would radically alter infringement tests but that some modification may be required to give *complete* effect to the absolute right to prepare derivative works.

(c) *From One Medium to Another.*

When a work is reshaped for another medium, oftentimes the underlying work's *format transfer* will transmute expression into different though equivalent forms. The simplest example is a work's translation from one language into another. Without proper instruction in foreign language, no lay observer would immediately recognize the following symbols: C U A T R O and F O U R. Two different languages—different but equivalent as to meaning. Thus, different though equivalent forms may be the proper focus for derivative rights and derivative works. It is the same when a play is transformed into a movie—the trier of fact, upon a proper "jury instruction," may easily be educated when assessing an infringement in this area. It is good common sense and finds support in a cautionary footnote in *Atari, Inc. vs. North American Phillips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir. 1982), wherein judicial recognition was indicated regarding the difficulty in applying the "ordinary observer test" across different formats, implying that it may be easily correctible on a jury instruction. Needless to say, the rules of the game are as important as the game itself. To that end, the "audience test" can remain meaningful and useful.

(d) *A Play is Not a Film.*

A play is not a film. Its story takes limited form on a stage and relies heavily on dialogue. A film is the opposite. The script of a

film, of necessity, multiplies with all sorts of additions and modifications.

(e) *From Novel to Play.*

The reverse is true when a novel becomes a play. It must be changed, rearranged, condensed and strengthened.

(f) *The Doctrine of Equivalents*

Because of the difference in format of *Lokey* and E.T. (play vis-a-vis film), the best way to determine infringement is to "see through" defendants' production and find a "web of structural dimensions" similar to plaintiff's material and compare it with plaintiff's play to see if there are any factual equivalents which amount to infringement. The "doctrine of equivalents" discounts the presence of minor changes and substitutions in an allegedly infringing work, broadens derivative rights, dispenses with any requirement of exact duplication ("picturization"), and prevents the elevation of form over substance that might allow a canny plagiarist to capitalize on the work of another, while at the same time, preventing contrivances to disguise a piracy.[5]

In this instance, petitioner alleges that defendants, without authority, have infringed her exclusive right to prepare derivative works. Determination of infringement of this exclusive right is predicated upon a comparison of the works themselves. The "equivalency test" is best suited for such a change of format analysis, but the two most often used tests are the "pattern" test[6] and the abstractions test. The former was developed by Professor

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[5]Judge Ferguson of the Ninth Circuit has promoted "doublespeak" language in true Orwellian prophecy. He said, "Copying is not copying so long as it is deleted or so well disguised as to be unrecognizable." The derivation test challenges such an unwise proposition out of *See vs. Durang*, 711 F.2d 141 (9th Cir. 1983), and thus provides the needed balance of defendant's privileges against the long-awaited rights of plaintiffs.

[6]The pattern test is demonstrated as to its structural sequence of events:

E.T.	LOKEY
Night. Aliens land on Earth and are exploring the terrain. Air Force men arrive and make a search. The alien ET squeals as he flees. The UFO leaves him behind.	Night. Aliens land on Earth and are exploring the terrain.
Children are at home playing a game. Michael, a teenage boy, and his friend do not allow 10-year-old brother, Elliott, to play. The inference is that he cheats. Mother Mary is at home tending to her duties.	Children are at home playing a game. A radio bulletin of a UFO sighting is heard. Lisa, a pre-teen, does not want to play with brother Michael anymore and accuses him of cheating. Father Joseph is at

Zachariah Chaffee and published by him in the Columbia Law Review Journal in 1945. The test correlates the designed sequences of connected incidents between the two works which move the work

The children are getting on her nerves. Elliott goes outside and hears noises coming from a shed. Sensing something strange, he runs into the house to sound the alarm. Mother is annoyed and aggravated over Elliott's antics. But her maternal instinct takes over; there could be something out there. The children leave. Harvey, the family dog, is in the house. Mother is saddened by her marital situation. She is a divorcee. She is without a man. The children search outside, find nothing.	home tending to his work. Michael, hearing the UFO report, wants to go out in search of it. Father thinks the report is hogwash. His male logic tells him so; it is nothing. He is annoyed and aggravated, especially at Lisa. He is out of patience with his children. Jack, the family dog, is in the house – his only solace. Father is lonely and sad that he is without a woman.
Late that night, Elliott searches the woods, finds ET, uses M&M candies to lure him home.	Lisa and Michael search the area and find two little aliens, Lokey and Fu. Michael becomes frightened and runs home. Lisa remains, tries to communicate, names the aliens using the letters of the alphabet — A, B, C, etc. — brings the aliens home.
Elliott's brother, Michael, and sister, Gertie, meet ET. Gertie screams, ET screams back, thinking it is a greeting. Mother Mary enters the room but they hide ET in the closet.	Michael arrives home in a panic, screaming to his father about a green monster. Later, more chaos and screaming when Lisa and the aliens enter their cabin. Lisa's guests greet Father. But chaos and screaming result.
Later, when the children are over their shock, they try to communicate with ET using a globe to describe where they are on Earth and trying to find out where ET is from.	When they get over the shock of the aliens, they try to communicate with Lokey and Fu. Father wishes he had a globe to demonstrate where they are on Earth.
ET levitates five clay balls in the air, demonstrating his psychic powers and his home in the universe. All are awed. (Previously, he brought a dying plant back to life.)	Lokey projects a thought form on the wall, demonstrating his telekinetic power. All are awed. (Previously, he levitated a rock in the same way.)
Elliott becomes telepathically tuned to ET. Love develops. The children will help the little creature.	Lisa becomes telepathically tuned to Lokey. Love develops. Lisa and her brother Michael will help the aliens. Father, too.

from cause to effect. The parallels formulated according to the test are intended to establish or disprove copyright infringement. The "pattern" test is a refinement of the "abstractions" test created by

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When Elliott goes to school, children are going to dissect frogs in a science class. Elliott, in tune telepathically with ET makes the children free all the frogs and saves them from certain death.

Gertie teaches ET English. ET tells the children he wishes to "phone home." So he makes a communicator device out of household items. He must solve the dilemma of getting back to his space craft.

The Air Force men continue to search for ET. Elliott and the alien go to the woods to try to make contact with the space craft. ET will die soon if he does not return to his craft. Earth's gravity is too much for his little body. Elliott and ET fly through the woods — fly with the use of mind power — on a bicycle. They crash land. ET must "phone home." They try to make contact with the UFO. Elliott falls asleep, and when he awakens, ET is gone.

Meanwhile, Elliott's mother, dressed in Halloween costume, silently sits over candles, a witch's wand in her hand. Worried about her youngest son, she waits, putting out the candles, with the wand. Elliott comes back sick. He asks Michael to find ET.

Michael finds ET and brings him back. Mother grabs Gertie and runs. The Air Force men arrive. ET is dying, so they try to save him. Elliott implores him not to die. A plant dies. ET is revived and the children

Because Lokey and Fu need to solve their dilemma of how to return to their space craft, Father suggests porpoises. The aliens bid farewell to find porpoises. Fishermen are going to harpoon them. The aliens free the porpoises and save them from certain death.

The aliens, with mind power, fly in search of a witch named Tollie when the porpoises say she has extra-terrestrial powers. She may solve the riddle of their dilemma. They crash-land in the Andes. The situation seems hopeless. They will die soon if they don't get help. Earth's gravity is too much for their little bodies.

When the aliens come upon the witch, she is watering dead plants. She sees the creatures, panics, screams; they scream back thinking it is a greeting. She throws a potted plant at them. She runs into the house. The plant comes to life at the alien's touch. The witch tries to call the authorities. They call for help to "go home." The witch kidnaps Fu and Lokey, weak and broken, cries out, "Mama, I'm coming home."

Lisa tunes in telepathically to Lokey and tells Father that they must go in search of him. He is in danger. Father agrees and they leave in search of the little space creatures.

Fu escapes and returns to find Lokey and the witch arguing. Finally she agrees to help them. They will find the landing site. Father, Michael and Lisa appear at the landing site. Lokey, Fu and the

Judge Learned Hand, who said "as respects plays, the controversy chiefly centers upon characters and sequence of incident, these being the substance." *Nichols vs. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). Chaffee, however, explained the refinement. He said: "No doubt, the line [of infringement] does lie somewhere between the author's idea and the precise form in which he wrote it down...[P]rotection covers the "pattern" of the work...the sequence of events, and the development of the interplay of characters." These are the things that "should not be imitated." Chaffee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 513-14 (1945).

The idea-expression dichotomy, as has been seen, originated in the case law and is supported by both tests. The two tests remain a useful approach for separating infringing from non-infringing

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kidnap him and drive him to the woods. The authorities are in hot pursuit. ET and the children arrive at the landing site; he crash lands as usual. They wait for the UFO. There they meet Mother, the Air Force man and Gertie. Mother and the Air Force man are attracted to each other. The Air Force man knows that ET must go even though he had searched for him for so long. The parting is time pressured, as others are in pursuit. Gertie runs toward ET. Then ET tells her to be good, turns to Elliott. "Come?" he says. "Stay," says Elliott. ET embraces the boy. "Ouch, I'll be with you forever, right here." There is a hint of a forever bond between the two worlds. ET leaves in the craft. A rainbow streaks across the sky. It is a happy ending, despite all the healing tears.

witch crash-land and roll in all entangled. All are gathered to meet the UFO. Father and the witch are attracted to each other. The witch realizes that the aliens must go home even though she had searched so long. The parting is time pressured. Lisa is sad. All watch the skies for the UFO. Lokey and Fu ascend to the space craft. "Mama, I'm coming home," cries Lokey. A rainbow streaks across the sky. It is a happy ending despite all the healing tears.

The adaptation of these important structural sequences from petitioner's play is what Judge Hand found to be fatal to the defense in *Sheldon vs. Metro-Goldwyn Picture Corporation*, 81 F.2d 49 at pages 54 and 55. In addition, in the play, the main cast of characters are these: One single parent (Father Joseph), two children (Lisa Mari, Michael), two aliens (Lokey, Fu), one dog with a man's name (Jack), one main antagonist, female (Tollie the Witch). In the film: One single parent (Mother Mary), three children (Elliott, Michael, Gertie), one alien (E.T.), one dog with a man's name (Harvey), one

works, especially when the 'essence' of the work sought to be protected is a story. It is true that the copyright law does not extend to any idea or process, etc., and is codified in the singular under 17 U.S.C. §102(b). The new Act equates far more closely to the marketplace, than did the old Act. The shift in emphasis from idea-expression to fair use is exemplified in §§106-118. It asks the singular question of whether the "use" of the work of one creator by an imitator is sufficiently harmful to the original work to permit recovery. It is a real-world question and deals with whether or not the key elements of a work have been appropriated. It is a fresh approach designed to effectuate a re-balancing of the underlying policies set out by Lord Mansfield — a re-balancing of the essential and potentially conflicting interests that are at the heart of copyright law. Lord Mansfield said:

> "We must take care to guard against two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community, may not be deprived of...their just merits and the reward of their ingenuity and labour; the other that the world may not be deprived of improvements nor the progress of the arts retarded."
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> *Sayre vs. Moore*, 102 Eng. Rep. 139, 140 (1785).

The new Act has freed the courts from their non-definitional wilderness. It is with the hindsight virtue of having faced hard problems that the congress mandated the courts to reshape their thinking to the legislative purpose and to the economic realities of the twentieth century. The courts have but one direction open to them: to advance the copyright law into the 21st Century.

(g) *The Commercial Transition.*

Novelist Darryl Ponicson[7] lamented the "demands of the medium" of film — simplicity and action. When his novels were "re-

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[7] Holt: *Books into Movies: The Big Compromise*, Part II, 219, Publishers Weekly, p. 34 (June 6, 1981). Another example of "transformation" is John Huston, who, after purchasing derivative rights, made movies "based upon" the works of numerous authors: Melville, Maxwell Anderson, B. Traven, Stephen Crane, Arthur Miller, Tennessee Williams, Kipling, etc. Professor Kaminsky documents in his book, *John Huston, Maker of Magic* (1978), how Huston altered the source work — sometimes minimally as with *The Maltese Falcon*, more often radically as with the play, *Key Largo* — until the transformed film was a personal vision of the director himself. Huston's procedure in transforming source works is not at all unusual in Hollywood and is the normal mode in which directorial creativity operates.

cast" for films, he thought them oversimplified and too fast-paced. But on the "commercial" movie screen they made sense. His book *Cinderella Liberty* in its movie form was so different that he tried to get the studio to change the title. "My story," he said, "took place in a hospital. In the movie they opened it up to other locations. Mine had a somewhat twisted sense of reality; the movie had a reality 'the masses' will understand. My female character had a harelip, a tin heart and a way with sailors—she was a good-time girl, a 'fleet chick.' In the movie she became the attractive young prostitute Marsha Mason plays. In the book she had three kids, in the movie only one. In the book the male character is a failed theology student; in the movie the only reference to theology is the fact that his father is a janitor at the local church. If you understood the film business, you'd see that was a perfectly logical move."

The above situation is typical of Hollywood. It is the problem of taking something from one medium and reshaping it to commercial audiences: How to take a work that may have appealed to a small audience only and "transform" it into a true rendering on screen of the author's original expression, but at the same time attract a mass audience?

The answer to that question lies in the language of § 106(2) which understood the "commercial transition"—the end result of which is the essence of an original work, now "transformed" as a movie.[8]

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[8] A word of explanation is in order here because of the Ninth Circuit's reluctance to actually view the film E.T. Screenplays are "barely readable conglomerations of dialogue, camera directions, and character analysis." C. Atkins, *Method to the Madness: Hollywood Explained*, 150 (1975). This is equally true, if not more so, of "continuity scripts." If the "audience test" is to be meaningful, the Court was "compelled" to see the film because that is what the motion picture "audience" saw. The audience did not read a "continuity script." Nor could it be expected to understand one because of its highly technical nature. It would confuse a layman because he could not meaningfully arrive at the "total concept and feel" of the movie because, for one, he has not seen the best evidence, which is the film itself, and two, without training the reading would be impossible. The technical directions alone would seriously frustrate and distract from not only the concept of the film but its "feel" as well. Since "substantial similarity" in the case law prior to the Act was determined by the ordinary lay observer or the particular audience, the refusal to see the film was an abuse of discretion and clearly erroneous. Also, since the Ninth Circuit stressed that its review was *de novo* in order to correct any errors below, then it should have "viewed" all the evidence, particularly the film, since it is the subject matter of the law suit. Defendants admit access for the motion even though the proof was offered to the Court by way of a rejection letter from Ned Tanen, the then president of Universal Studios. Litchfield also corresponded with Spielberg in a letter dated November 18, 1980. Thus, to concede access is a

(h) *The Law Must Have a Principle of Growth.*

The New Act does not state that a derivative work must be a "copied" work; it does not state that it must be a substantially copied work or that it must be substantially based upon a prior work. Copying, as the act makes explicit, is the reproduction right. Semantics, although given scant attention in many copyright decisions, are important when dealing with abstract concepts. Words mean what they mean, and nothing more, to paraphrase Alice in Wonderland. Copy means copy. "Based upon" means what it says. "Incorporated in some form," means what it says. It cannot be presumed that Congress acted frivolously, or that the derivation right is a superfluous anomaly, or that it is a pointless addition to the Copyright Act. Such an interpretation squares with all accepted rules of statutory construction. Instead it is better to view the law through Cardozo's eyes like "the inn that shelters for the night," as "not the journey's end," but "like the traveller, must be ready for tomorrow. It must have a principle of growth."[9]

II. The Extreme Substantial Similarity Test of the Ninth Circuit is so Narrow as Applied and so Unreasonable on Its Face as to Make the Protection Granted by Congress Totally Ineffectual.

(a) *Denial of Due Process of Law and Right to Trial.*

The Ninth Circuit's affirmation of the District Court's opinion violates "due process" as well as the right to trial by jury, *infra*. The

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redundance and a ruse to destroy the "impact" that this knowledge would have on a jury. This evidence was revealed at Litchfield's deposition and will be presented at trial. But the point here is that defendants admittedly had the play in front of them and subsequently produced a film similar to the play in many details. Thus, "fair use" must be determined by a consideration of all the evidence. See *Mathews Conveyor Co. vs. Palmer Bee Co.*, 135 F.2d 78, 85 (6th Cir. 1943). Also, *Dellar vs. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662. The Ninth Circuit "excused" itself from considering the film by citing *Jason vs. Fonda, supra*, as authority. (This non-existent "legal fiction" is as bizarre as the district court's statement that it would deny Litchfield's cross motion for Summary Judgment even though Judge Hall admittedly had not read the play but would take defendants' same motion under submission.) Simply stated, a continuity script can never be a fair representation because it underscores what the audience in a film is never aware of — the technical aspects of camera angles and directions. A film is an audio-visual work with simultaneous presentation of two dimensional sights and sounds engaging the senses in a unique manner. The experience of watching a film or reading a continuity script is like comparing apples and oranges.

[9]Cardozo, *The Growth of the Law*, 20 (1924).

5th Amendment as a constitutional guaranty demands only that the law shall not be unreasonable, arbitrary, or capricious. See *North American Co. vs. Securities and Exchange Commission;* 133 F.2d 148, 154. The lower Courts have been all these.

Respondents state that recent cases have "affirmed that the intrinsic prong of the Krofft Analysis may be decided on summary judgment. The derivation of this affirmation is *Jason vs. Fonda*, 526 F. Supp. 774 (C.D. Cal. 1981).

Jason held, at page 777, and essentially paraphrasing Krofft's holding, that if actionable similarity in ideas is found—"then the *trier of fact* must decide whether there is substantial similarity in the expression."

There can be no doubt that a district court, or a court of appeals, *is not a trier of fact.* The Court's sole function is to determine *if* there are factual issues *to be tried.* See *Arlington vs. City of Fairfield, Ala.*, 414 F.2d 687 (1969); *Gross vs. Southern Ry. Co.*, 414 F.2d 292 (1969). The Court is *not* trying facts, it is deciding a pure *question of law* on such a motion. See *Neely vs. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341 (9th Cir. 1978). The Court cannot weigh evidence or judge the credibility of witnesses.[10]

However, Jason does flatly state in dicta and without citation to authority or explanation that summary judgment is proper if no trier of fact could find plaintiff has satisfied both Krofft tests.[11]

The latter statement in Jason is in conflict with *Krofft* and *Twentieth Century Fox Film Corp. vs. MCA, Inc.*, 714 F.2d 1327 (9th Cir. 1983), and with *its own statement* that if triable issues of similarity of ideas are found, a trier of fact—not a court deciding only issues of law—is who must decide the issue of similarity of expression.

State decisis must stand for the proposition that Krofft's holding as upheld by *Twentieth Century* cannot be effectively overruled by the latter conflicting statement in Jason, made at odds with both *Krofft* and *Jason's* prior finding, and unsupported by any analysis, reasoning or authority.

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[10] Thus, for example, if there is some evidence of qualitative similarity of a substantial nature, and evidence to the opposite, the Court cannot weigh the two, but must permit the action to proceed, for to do so would invade the province of the jury.

[11] From Jason, the cases respondents cite follow without analysis, simply eventually referring back to *Jason; See vs. Durang*, 711 F.2d 141 (9th Cir. 1983) makes a similar statement, then cites *Jason* (which, again, cited no authority and gave no explanation) as the only authority, at the page where *Jason's* conflicting statements reside. *Litchfield vs. Spielberg*, 736 F.2d 1352 (9th Cir. 1984), in turn cites *See* where it, in turn, cites *Jason.*

The logic for the statement in Krofft that only a trier of fact should decide the issue of "expression similarity" is explained by the decision but is summarized as follows: (1) If a triable issue of fact is found, the case is to go to the trier; (2) If a triable issue is found regarding "idea similarity," then due to the peculiarly and singularly factual nature of the analysis of the issue of "expression similarity" and due to the long-held and frequently reiterated belief that the observations of the ordinary person are key (i.e., ordinary juror, not a tenured federal judge), it is best left to the system which is specifically fitted to test such observations to determine the issue—the jury system, or trial.

The logic of this position is three-fold. First, it is clear and straightforward, and Krofft's entire structure and reasoning upholds it. Aside from the flat, unsupported statement of dicta in *Jason*, and its progeny, the history of copyright decisions supports it as well, as was fully set forth in petitioner's opening brief. Second, the 5th Amendment mandates that no person shall be deprived of life, liberty, or property, without due process of law. The 9th Circuit's extreme test is unreasonable. It circumvents notions of fairness and mocks justice. Thus, petitioner challenges the wisdom of *Jason* as law and its application by the lower courts, and instead relies on the well reasoned opinion by Justice Tang in *Krofft*. Third, the 7th Amendment's right to jury trial is not a privilege to be discarded or disregarded by whim, fancy or policy. It is a right guaranteed by the Constitution.

(b) *The Lower Courts Failed to Properly Assess Similarities Between* Lokey *and E.T.*

The lower courts looked for differences and, of course, they found them. Is the test for infringement whether the works are substantially *the same* or *identical*?[12] This patently different and

[12] In their brief, appellees made reference as to whether *differences* between works were material. Though differences may exist between works, what is the significance of differences that do not necessarily change the "essence" or features of the plaintiff's work, but are instead entirely additional? Under the new Act, if a defendant incorporates a sufficient portion of a plaintiff's sequence of events, he cannot escape infringement by adding original episodes somewhere along the line. Thus Professor Nimmer's proposition that "a defendant may legitimately avoid infringement by intentionally making significant changes in a work," 3 Nimmer § 13.03[B], requires modification where a defendant slavishly copies the plaintiff's sequence of events. See *Warner Bros. vs. American Broadcasting Co.*, 720 F.2d 231 (2d Cir. 1983), where the court attempts to deal with potential defendants who wish to tread the infringement line in their own studied efforts to adapt other works without renumeration to their authors.

more burdensome test was suggested by respondents and adopted by the Ninth Circuit (appellee's brief, fn. 10). It is at odds with *Krofft* and every other circuit in the nation save the 2nd Circuit which also recently departed from the "audience test." The audience test in the case law holds that liability for plagiarism should ensue when the average person is able to perceive "essential similarity" among the works in question. The test has traditionally been accepted by the modern courts[13] and has been the foundation for determining overall similarities. As to differences, would the "ordinary observer" note the differences, or would he be "disposed to overlook them, and regard their aesthetic appeal as the same?" *Peter Pan Fabrics, Inc. vs. Martin Weiner Corp.*, 274 F.2d 487, 489 (2nd Cir. 1960). That is the inquiry and it must be decided by the proper audience — not a tenured Federal judge or judges.[14] Thus, if the foundation for determining overall similarities is the ordinary observer test, then Judge Wright's opinion indicates that he adopted Judge Hall's approach by improperly focusing on the differences and not the similarities. The test is whether the similarities are "material," not whether the differences are "material." To say that that which was not 'borrowed' is 'material' and therefore non-infringing is to turn the infringement test upside down, in derogation of the congressional mandate and to fulfill the Orwellian prophecy of "newspeak" and "doublethink" which ignores reality and pretends to justice.[15]

Thus, if numerous differences are to undercut substantial similarity, they must be in kind rather than degree. The differences must be "truly different" else a plagiarist can excuse the wrong by showing how much of his work he has changed from the prior work. Ultimately, care must be taken to protect and guard against such appropriation of someone's work to the considerable financial benefit of another. The courts must discourage these facile attempts to "reap where one has not sown," to cut it at its roots to deter plagiarism thereby fostering the creativity of authors by rewarding them through financial gain in their chosen profession.

[13] However, the Second Circuit recently departed from the audience test in *Eden Toys, Inc. vs. Marshall Field and Co.*, 675 F.2d 498 (2d. Cir. 1982), prompting a sharp dissent from Judge Lumbard.

[14] Because the Seventh Amendment affords a constitutional right to trial by jury in civil cases in federal court where the amount in controversy exceeds twenty dollars, a difficult problem would be encountered were abandonment of the lay jury — the ordinary person — in favor of a panel of tenured judges proposed. A copyright panel might be conceivable as an aid to the trier of fact, but the issue of infringement ("expression similarity") must remain with the jury.

(c) *Improper Appropriation*

The copyright statute gives protection to "the work" in order to promote the Progress of [the] useful Arts.[16] If the qualitative approach is the approach taken by most courts and commentators because it seems closer to the purposes of copyright protection, then the part that makes Litchfield's work popular and valuable is that portion upon which it's popular appeal and commercial success depends. The proper inquiry is whether the similarities relate to matter which is the qualitative portion of plaintiff's work and not whether such material constitutes the qualitative portion of defendant's work, which in this instance happens to coincide. Thus, if half of plaintiff's work is incorporated in a film and if this amount is sufficient in quality and value to be considered "the work" for purposes of the statute, then it *is* "the work" no matter how much more extensive the accused work may be. Thus, if the similarities are truly "insubstantial,"[17] then its appropriation will do no harm to plaintiff, and therefore cannot be considered improper appro-

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[15]George Orwell was the author of a book entitled *1984* which dealt in fictional form with the methods of totalitarian control of the populace. In the book, indoctrinal belief systems are the means to absolute power which denies reality based on environmental control. The court system is an environment unto itself and must take great care not to impose unreal concepts in defiance of objective reality. As Lord Acton said, "Power corrupts and absolute power corrupts absolutely." Our system of justice, through the appellate process, protects against just such attempts by the lower courts. It is in the public interest for this high court to keep the lower courts from paying insufficient deference to the pronouncements of the legislature.

[16]U.S. Constitution Article 1 §8 Clause 8.

[17]The Film E.T. has destroyed the demand for Lokey. According to Arnstein, it is a major factor in substantiality. Both works begin the same way: aliens landing on earth, at night, and children at home playing a game. In one there is sibling rivalry: a child does not wish to play anymore and accuses the other of cheating. In the other a child wishes to play with the others but is not allowed to because he cheats. In both works, the single parent is at home tending to work. In one work, the radio reports a UFO sighting and the children wish to search for it. In the other, a child hears noises coming from a shed, informs the others; they go outside in search of —what? Nothing. Later that same night the child encounters the alien. In both works, the single parent is frustrated over the marital situation. Loneliness. The single parent in both works has one solace—the family dog. In both works, aliens are found and brought home. In the one, it is two aliens, in the other, just one. In both works, the alien trips over an object: in the one, over a garbage can—levitates it in exasperation; in the

priation since it is the harm to the plaintiff's copyright which is the court's primary concern.

Petitioner has demonstrated sufficient similarity under any test, whether under the old or new Act, and should have easily survived a

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other, the alien trips over a rock — levitates it for the same reason. Early in both works, the alien demonstrates its telekinetic power. In both works screaming is thought to be a greeting. In both works an alien, through mind power, projects an holistic map: in the one, it is a globe; in the other, clay balls are levitated in the air, a map of the universe — another demonstration of telekinetic power. All are awed. In both works, the lead child becomes telepathically linked to the alien. From this a bond develops. In one, the child is a girl; in the other, a boy. Both are about ten or twelve years old. In both the aliens are friendly, lost, disoriented. In the one, the alien is left behind by accident; in the other, the aliens accidentally fall out of the sky. In both the dilemma is getting back to the space craft. In the one, the alien must figure a way to communicate to the ship, to give its location. In the other, the dilemma is greater: something to do with the size of the space ship and Earth's gravitational force. The space craft can come only so low while the aliens can levitate only so high. In both the problem is how to safely get back to the craft, the aliens fighting against time, survival depending upon finding a solution to their problem before gravity kills them. In both the answer to the riddle lies in the children, in their help. In the one, the alien goes into the woods to communicate to the skies with a make-shift device. In the other, the aliens travel afar in search of an answer, to the sea, and finally to the mountains. In the search, the aliens are separated from the children. In both works, the aliens can fly with mind power but gravity makes landing difficult, sometimes comical. Both works express the love of life itself, of all living things. In the one, school children are going to dissect frogs in a science class. Through telepathy, the alien frees the frogs and saves them from certain death. In the other, aliens encounter porpoises and fishermen are going to harpoon them. The aliens save them from almost certain death. In both the government is in pursuit and a child is separated from the alien, yet linked by a telepathic bond. In the one, a child knows when the alien is in trouble; in the other, the child feels what the alien feels. In both the main antagonist wishes to capture the alien for fame and recognition, having waited so long for the encounter. In both the main antagonist has a single mission — to capture aliens. In the one, the alien dies, is revived and says "phone home, phone home." In the other, an alien is dying and cries, "Mama, I'm coming home." In the one, after the authorities have captured the alien, the children kidnap him. In the other, the antagonist captures one of the aliens but he escapes. In both the antagonist finally relents and will help, knowing that this is how it must be. In both the single parent is attracted to the antagonist. In both all the key characters come together for the finale at the landing site. In the one, the lead child bids a fond farewell with the following words, "I will send you pictures, right here," points to forehead, "it will be just like being with you forever." In the other, a tearful farewell, "Ouch, I'll be with you forever, right here." It is all so sad as all farewells

motion for summary judgment. Respondents have argued differences between the works. Actually, the differences are such as might deliberately be contrived to disguise the appropriations. *Coleur International Ltd. vs. Opulent Fabrics, Inc.*, 330 F. Supp. 152 (SDNY 1971).

The combination of plot features and character interactions is the essence of plaintiff's work. It is both quantitatively and qualitatively significant to the play. The equivalent characters found in respondents' film are qualitatively important to it. The combination of plot and character and incidents should have precluded summary judgment on whether respondents *based* their work on a material element of petitioner's copyrighted play. A triable issue of fact did

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are, but it is a happy ending too because (1) a single parent will have a mate, (2) the children will have two parents, (3) false pride yields to love, as it should, and (4) the world is a better place for the experience. Thus, it can be seen that the audience test becomes a measure of appropriation of the copyright holder's rights by determining the degree the work's audience appeal is lessened. According to *Arnstein*, substantially turns on "whether defendant took from plaintiff's work so much of what is pleasing to the ears of lay listeners who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to plaintiff." In this instance, E.T. "relied" on Lokey's unique characteristics to create massive audience appeal. See *Boosey et al. vs. Empire Music Co., Inc.*, 224 Fed. 646 (one brief phrase of a song was appropriated). The words, "I hear you calling me" was the title of a song sung by John McCormick. Al Jolson sang a ragtime song called, "Tennessee, I hear you calling me." In the former, a living person stands on the grave of his dead loved one and hears her voice. In the latter, a black man wants to go back to his old home in Tennessee. Judge Mayer said: "The 'I hear you calling me' has the kind of sentiment in both cases that causes the audience to listen, applaud, and buy copies in the corridor on the way out of the theatre." At bottom, Judge Mayer recognized that it was the quality of the matter taken, not necessarily the amount taken, that really mattered. See also *Higgins vs. Baker*, 309 F. Supp. 635 (DCNY 1970). It also was the effect on paying audiences that lay at the heart of copyright economics.

"ET phone home," "Mama, I'm coming home." "I will send you pictures, right here. It will be like being with you forever." "Ouch, I'll be with you, right here." This farewell scene is so idiosyncratic standing alone, so unique in its representation as to be considered "eccentric" and thus substantially similar. Furthermore, it is the timeless quality of the love between alien and child, best exemplified in the farewell scene which grabs the heartstrings and sends audiences out of the theatres crying and cheering. See *Heim vs. Universal Pictures Co.*, 154 F.2d 480. It is not to say that one or two lines of dialogue will always constitute infringement, but only that a substantial triable issue of fact did exist regarding the quality of the matter taken for which petitioner had a duly registered copyright.

exist as to whether the respondents did "improperly appropriate and use" a qualitatively important *portion* of the petitioner's work in *some form*, given the similarities.

The Ninth Circuit has ignored the express intent of Congress set forth in the portions of the House Report cited and quoted by petitioner. Instead, it relies on an incorrect application of existing case law decided before enactment of the statute in 1978, and subsequent case law, which presumes that the Act was intended in section 106(2) to be merely a replication of section 106(1). Its thinking is unsound and incorrect and violates the policy of the new Act—greater protection for the author (which includes extending protection to the author for life plus fifty years; derivation rights; adjustments for technology; and termination provisions re: derivative works, etc.). Ironically, *Lone Ranger Television, Inc. vs. Program Radio Corp.*, 740 F.2d 718 (9th Cir. 1984), a case decided within weeks of the instant case by a different panel, recognized the distinction between the reproduction right and the derivative right. The panel in *Litchfield* "condemned" attempts to classify *Lokey* as a derivative work under the statute sections 101, 106(2) and 501, as "frivolous" and accused petitioner of trying to radically alter copyright law. In point of fact, it is the Ninth Circuit's attempts to rationalize their ruling, which has so far departed from accepted standards of judicial proceedings (by sanctioning such departures by lower courts in *Jason* and *See*), as calls for an exercise of this Court's power of supervision. This case is "ripe" for an interpretation of the language of the new statute pertaining to derivative rights violated without consent of the author and for a redefinement of rules and policy, in accordance with the purposes of the new Act.

In the last analysis, any story can conceivably be reshaped and channeled to different narrative objectives, once given to a gifted craftsman; but the extent of such reshaping should not exonerate the unauthorized taking of an author's work; and whether this was actually done is an issue yet to be resolved.

(d) *A Triable Issue of Fact.*

The Court in *Twentieth*, supra, noted that if a triable issue existed as to qualitative similarity of *either* ideas *or* expression, then a grant of summary judgment would be improvident:

> "[W]e conclude that the films do in fact raise genuine issues of material facts as to whether *only* the [plaintiff's] idea *or* the expression of that idea was copied. *Sid & Marty Krofft Television Prods., Inc. vs. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977)." (Emphasis added.)

The Court went on to say that it was not deciding whether ideas *or* expressions were actionably similar, only that reasonable minds could differ on these factual issues. The Court so ruled on the basis of similarities between the works, listed in footnote 5 of the opinion, at page 1329.[18]

The instant case should be treated no less differently. A basic assumption of both lower courts was that the high professional standing of the persons involved somehow makes it impossible for them to have done anything which amounts in law to infringement. Second, that no similarity of idea, or expression, has much significance if it is labeled an abstraction; and, further, that many instances of suspicious, but inexplicable and unique similarities do not have a cumulative effect.

(c) *Copyright in American Property Law.*

In recent years, copyright has become one of the most important areas of American property law. Today, livelihoods are earned predominantly through the sale of information, expertise and personal services. There has been an explosion in technology. The extent to which authors are protected in their exclusive property rights is central to national growth. Congress has spoken. The term "derivative work" is new to the statute and clearly defined. It is used elsewhere in sections 203 and 304(c)—strong evidence that excludes any meaning which is not stated. *2A Sands, Statutes and Statutory Construction*, §47.07 (Supp. 1978). Only where one of the major purposes of the legislation would be defeated should a statutory definition be interpreted to mean other than what it says. *In Re: Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, at 643 (1978). Clearly, the major purpose of the broad derivative work definition serves the Congressional purpose of granting greater protection to the author which is really the *raison d'etre* of the entire Act.

The premise underlying the law giving the owner of a copyright exclusive control over the right to prepare derivative works is based on the assumption that a film is *more* than a mere reproduction of a

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[18]The similarities included: Both stories revolved around a struggle between democratic and totalitarian forces; in both works the hero's father was a past leader of the democratic force; the leader of the democratic forces was an older, wiser man; an important planet is destroyed. The heroine in each is imprisoned; a leading character returns to his family in each, sequences alternate between the opposing forces, a romance exists between a friend of the hero and the daughter of a leader, a friendly robot is hurt, spaceships look old and used, one scene in each incorporates aliens playing music, climaxes similar.

novel, or short story, or a play. If the derived product is taken and used without consent of the author, it is infringement of the exclusive preparation right. It is different from the reproduction right because a derivative work requires a "textual" change as was explicitly recognized in the Copyright Law Revision Parts, Preliminary Draft at 115. Thus, a work is derivative if it is "textually" changed and "based upon" a pre-existing work or works.[19] When this is done without permission, it is an invasion of the exclusive right to "prepare." Whereas, under the old law, the owner of the copyright had only the exclusive right to "print, reprint, publish, copy and vend the copyrighted work,[20] the owner of the copyright under the new law was given the exclusive right to "use" the work in preparation of derivative works. Thus invaluable rights are preserved that went unprotected under the old Act. Respondents suggest that to extend protection to a case like this is to extend it to ideas. This misses the point. If the only similarity between *Lokey* and E.T. had been the story situation, or the basic idea of an alien stranded on earth and befriended by children, then certainly there could be no protection. But where, as here, one author takes this situation and complicates it by starting at point A and developing a plot or sequence of events around it to point Z, then protection should obtain where the sequence of events is "tracked" above and beyond the basic story situation. The direction respondents could have taken in their story situation is as varied as the moves in a game of chess. Instead, they chose to knowingly

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[19] Professor Nimmer, in his treatise on copyright law published more than twenty years ago, confused inspiration with derivation. He stated that "in a broad sense, almost all works are derivative." His reasoning is faulty under the new Act. If a derivative work is one which is based upon a prior work or works and depends for its own existence on the prior work or works and is the source of the new work and is recognized as such, then it is a derivative work. It would be patently absurd to say that Hemingway's writings are based upon Faulkner's writings. In no sense is a work derivative unless the 'preparer' is focusing on reshaping a 'particular' work or works. Writers usually create out of life experiences, not on other works. True creation is based on "experience, thought and reflection," and to give undiscriminating equal recognition to a re-creator (one who reshapes a prior work with intent to do so) of another's work, is to have little understanding of the creative process. Unfortunately, the film industry has been loathe to give intellectual and financial credit where it is due, especially to writers.

[20] 17 U.S.C. § 1(a) (1964). There are other exclusive rights enumerated in the old act, but none is as broad as the exclusive right to prepare derivative works enumerated in the new Act.

overstep the infringement line at the risk of being discovered, sought to destroy petitioner's valuable rights in her own work, while reaping the benefits of their chicanery.[21]

III. Conclusion

There is no indication in the 1976 Copyright Act, or in its legislative history, or in its predecessor legislation, or in any known decisions which would promote special treatment solely because a particular film is the most successfully commercial film of all time. The copyright law of the United States derives from the Constitution, and must be administered nationwide in a uniform way as to protect all artists and creators, particularly in this era of instant global communication and dissemination, or it is a meaningless sham and a cruel deception. If an artist does not have the same copyright protection in Los Angeles as in Louisiana, then there is no real federal copyright protection. If an artist does not have the same protection whether he is rich or poor, or famous or unknown, then there is no justice at all—there is only the 'business' of the courts. Thus, it is vital for this Court to render a modern decision, that, for good cause, a writ of certiorari be issued to review the judgment and opinion of the Ninth Circuit—so that all things hidden shall be revealed—and that for this the petitioner ever prays.

Respectfully submitted,

RALPH FRANCIS SERVER
LAWRENCE RUBEN BARBA

Attorneys for Petitioner
Lisa Litchfield

Annexed:

"A" Opinion of the Ninth Circuit—filed July 6, 1984

"B" Opinion of the Court Below—filed June 13, 1983

"C" Denial of Petition for Rehearing and Suggestion for Rehearing En Banc—filed September 28, 1984

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[21] Such deliberate attempts to avoid infringement is an old one in Hollywood. It has been going on for years and explains the mediocrity of most of today's television programming. Deliberate attempts at literary larceny without liability has probably done more to retard the progress of the arts than anything else because prior to the new Act there was really no deterrent to this kind of behavior. As a matter of fact, it has been encouraged by the 'movie courts' in both New York and Hollywood.

APPENDIX

APPENDIX "A"

A1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LISA LITCHFIELD, Plaintiff-Appellant, vs. STEVEN SPIELBERG; MCA INC.; UNIVERSAL CITY STUDIOS, INC.; EXTRA-TERRESTRIAL PRODUCTIONS; KATHLEEN KENNEDY; NED TANEN; and MELISSA MATHISON, Defendants-Appellees.	)	No. 83-6045 DC No. 82-3867 CHH OPINION

Appeal from the United States District Court
for the Central District of California
District Judge Cynthia Holcomb Hall, Presiding
Argued and Submitted June 5, 1984

Before: WRIGHT, FERGUSON, and REINHARDT,
Circuit Judges. WRIGHT, Circuit Judge:

The issues: (1) Did the producers of the motion picture, *E.T.—The Extra Terrestrial*, infringe the copyright of a musical play, *Lokey from Maldemar*, and (2) Was summary judgment proper on the issue of substantial similarity?

Litchfield wrote and copyrighted *Lokey from Maldemar*. Subsequently the defendants produced *E.T.*

Litchfield sued for copyright infringement, unfair competition, and various state claims, alleging that *E.T.* was copied from her play. The district court granted defendants' motion for summary judgment on the copyright claim and dismissed the remaining claims.

On appeal, the main question is whether summary judgment was proper on the issue of substantial similarity. We hold that it was.

FACTS:

The district judge's findings of fact of June 10, 1983 state the case accurately:

> Plaintiff Lisa Litchfield is the author of a one-act play entitled "Lokey from Maldemar." Litchfield wrote the play in 1978, and public performances were given in Los Angeles in September 1978. Subsequently, she submitted a copy of "Lokey" to defendant Universal City Studios, Inc., in the hope that the work would be purchased for purposes of developing a motion picture. These aspirations were disappointed, however, when Universal rejected "Lokey" as unsuitable for film treatment in October 1979. Nonetheless, plaintiff continued her efforts to market the work, adapting a "screenplay outline" of "Lokey" in 1980 from the 1978 theatrical version. Despite repeated efforts to find a receptive buyer for her works, plaintiff failed to find success in Hollywood.
>
> As originally developed in 1978, "Lokey" was a musical play about the adventures of two aliens, Fudinkle and Lokey, who are temporarily stranded on Earth when their spacecraft is immobilized by gravity. After landing near the North Pole, the aliens meet Lisa Marie, her younger brother Michael, and their father, a scientist stationed at the Sorenson Research Center at the North Pole. After temporarily detaining the children with an energy field, the aliens quickly learn English and are invited home by Lisa Marie to meet her father. At the cabin, Lokey demonstrates his extraordinary extra-terrestrial powers by psychokinetically taking a gun away from her father; reviving the father from a heart attack; projecting a map of the Earth on the cabin wall through mind power; and revealing his own destiny as a future ruler of his planet. Lisa Marie demonstrates her own terrestrial charms, teaching Lokey to kiss and inducing him to promise to send "mind pictures" to her after the aliens' departure. Fudinkle and Lokey then

travel to a beach in Japan, where they capsize a fishing boat filled with porpoise hunters. Next, the aliens travel to the Andes Mountains, where they meet Tollie Marx, a prophetic witch. Finally, all of the characters appear on the edge of the Pacific Ocean, where the aliens bid the humans farewell as they return to their ship.

On June 11, 1982, the defendants' film "E.T.—The Extraterrestrial" opened at commercial movie theaters. "E.T." is the story of a small alien accidentally left behind when his fellow explorers are forced to hastily leave Earth. E.T. is lured, by hunger and curiosity, into the California suburban home of 10-year-old Elliot, his brother and sister, and their mother. During the following days, E.T. learns a few words of English; discovers television, beer, and other appurtenances of contemporary American life; and constructs a transmitter to "phone home." The children, in turn, learn that E.T. possesses unearthly powers: E.T. levitates objects through psychokinesis; heals a small cut with his glowing finger; revives a wilted flower; and establishes a psycho-physical empathy with Elliot. Yet E.T.'s powers are not total; as time passes, E.T. gradually deteriorates. After an apparently unsuccessful attempt to contact his people, E.T. is captured by the scientific investigators who have stalked his existence since he was left behind by his spaceship. Following his capture, E.T. appears to have expired, but he revives when he senses that his people are returning for him. A chase ensues, and the film concludes with E.T. bidding farewell to earthling friends and returning home.

Litchfield sued for copyright infringement, violation of the Lanham Act, unfair competition, misrepresentation of story authorship, breach of implied in fact contract and breach of confidence. On February 9, 1983, the district court dismissed the Lanham Act, state unfair competition and misrepresentation of story authorship claims. Plaintiff appealed this interlocutory order, but asked for and was granted voluntary dismissal in August, 1983.

On June 16, 1983, the district court granted summary judgment to the defendant on the copyright infringement claim and dismissed

the pendent state claims. Plaintiff filed notice of appeal of the summary judgment order on July 13, 1983.

A. *SUBJECT MATTER JURISDICTION*

Defendants question the court's jurisdiction over the unfair competition and misrepresentation of story authorship claims because the July 13 notice of appeal did not name these claims.

A mistake in designating the judgment appealed from does not cause the loss of the appeal as long as intent to appeal from a specific judgment can be fairly inferred from the notice, and appellee is not misled by the mistake. *Munoz v. Small Business Administration*, 644 F.2d 1361, 1364 (9th Cir. 1981). An appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment. *Id.* Here, the premature appeal of the interlocutory order had been filed and served, and the issues were fully briefed. Defendants have shown no prejudice resulting from our review of these claims.

B. *COPYRIGHT INFRINGEMENT*

1. Elements

To prove copyright infringement, the plaintiff must show (1) ownership of the copyright, (2) access to the copyrighted work, and (3) substantial similarity between the copyrighted work and the defendant's work. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977). The parties agree that plaintiff owns the copyright to *Lokey*. For the purposes of the motion for summary judgment, defendants concede they had access. The only issue is whether summary judgment was proper as to substantial similarity.

Substantial similarity is usually an extremely close issue of fact and summary judgment has been disfavored in cases involving intellectual property. *Twentieth Century-Fox Film Corporation v. MCA, Inc.*, 715 F.2d 1327, 1330 n.6 (9th Cir. 1983). It is appropriate, however, if reasonable minds could not differ as to the absence of substantial similarity in expression. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983).

We review the propriety of summary judgment *de novo*. *Twentieth Century-Fox*, 715 F.2d at 1328. The evidence and inferences must be viewed in the light most favorable to the plaintiff. *Id.*

2. Comparison of E.T. and Lokey

Before considering a motion for summary judgment on the issue of substantial similarity, the court must make a detailed compari-

son of the allegedly infringing and infringed works. To this end, the district judge (1) read the 1978 and 1980 versions of *Lokey*, (2) read the "continuity" script of *E.T.*, and (3) viewed *E.T.* at defendants' screening room.

Litchfield claims that it was prejudicial error to view *E.T.* outside the presence of her counsel. She alleges that the version of *E.T.* shown may have differed in some material respects from the version that is shown publicly.

There is no record that Litchfield objected formally to the showing of *E.T.*, nor does it appear that she asked to review the film. We will not review an issue not raised or objected to below unless necessary to prevent manifest injustice. *Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806 (9th Cir. 1982).

Our *de novo* review of the issue of substantial similarity removes any prejudice that might have resulted from this alleged error. We need not consider it.

Our own, independent review of the works is based on readings of (1) the two versions of *Lokey*, and (2) the continuity script of *E.T.* We express no opinion whether reading a continuity script will suffice to allow comparison of a motion picture with other works in all cases. *Cf. Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939). In this instance, comparison based on the continuity script is permissible because neither party has claimed that the continuity varies from the movie. *See Jason v. Fonda*, 698 F.2d 966 (9th Cir. 1982), *incorporating by reference*, 526 F.Supp. 774, 777 (C.D. Cal. 1981).

3. **Summary Judgment on the Issue of Substantial Similarity**

We may uphold summary judgment if no reasonable jury could find substantial similarity between *E.T.* and *Lokey*. *See v. Durang*, 711 F.2d at 143.

To prove infringement, a plaintiff must show that the works are substantially similar in both *ideas* and *expression*. *Sid & Marty Krofft*, 562 F.2d at 1164.

Similarity of ideas may be shown by an extrinsic test which focuses on alleged similarities in the objective details of the works. *Id.* The extrinsic test requires a comparison of plot, theme, dialogue, mood, setting, pace and sequence. *Jason v. Fonda*, 698 F.2d 966 (9th Cir. 1982), *incorporating by reference*, 526 F. Supp. 774, 777 (C.D. Cal. 1981).

Similarity of expression depends on a subjective, intrinsic test. This test focuses on the response of the "ordinary reasonable person" to the works. *Sid & Marty Krofft*, 562 F.2d at 1164.

Litchfield relies on a list of similarities between *Lokey* and *E.T.* to show the extrinsic similarity of the works. She argues that there

are too many similarities, especially in the sequence of events and incidents leading to the climax, for the court to determine that there is no material issue of fact.

While we have relied on such lists of similarities in the past for "illustrative purposes," *Twentieth Century Fox*, 715 F.2d at 1329 n.5, they are inherently subjective and unreliable. We are particularly cautious where, as here, the list emphasizes random similarities scattered throughout the works. *See McMahon v. Prentice Hall, Inc.*, 486 F. Supp. 1296, 1304 (E.D. Mo. 1980).

Viewed in the light most favorable to the plaintiffs, some similarities in the opening scenes of *Lokey* and the movie *E.T.* may be more than stock scenes. There is no substantial similarity, however, between the sequences of events, mood, dialogue and characters of the two works. Any similarities in plot exist only at the general level for which plaintiff cannot claim copyright protection. *See Jason*, 526 F. Supp. at 777.

There is even less similarity of expression. To constitute infringement of expression, the total concept and feel of the works must be substantially similar. *Sid & Marty Krofft*, 562 F.2d at 1164. The concept and feel of the works here are completely different.

Whereas *E.T.* concentrates on the development of the characters and the relationship between a boy and an extraterrestrial, *Lokey* uses caricatures to develop its theme of mankind divided by fear and hate. No lay observer would recognize *E.T.* as a dramatization or picturization of *Lokey*. *See Bradbury v. Columbia Broadcasting System, Inc.*, 287 F.2d 478, 484 (9th Cir. 1961); *Kustoff v. Chaplin*, 120 F.2d 551, 559 (9th Cir. 1941).

C. *PRODUCTION OF A DERIVATIVE WORK*

Litchfield argues that defendants violated section 106(2) of the Copyright Act, 17 U.S.C. § 106(2) (1982), by preparing a derivative work based on *Lokey*. The district court did not address this issue.

Section 106(2) grants the exclusive rights to prepare a derivative work to the holder of the copyright. 17 U.S.C. § 106(2). To constitute a violation of section 106(2) the infringing work must incorporate in some form a portion of the copyrighted work. Notes of the Committee on the Judiciary, House Report No. 94-1476, *reprinted in* 17 U.S.C. § 106(2) (1982).

Litchfield argues that section 106(2) was intended to expand the definition of derivative works to include any work based on a copyrighted work. She argues that the similarities between her play and the movie constitute the required "incorporation" and show that *E.T.* was based on *Lokey* for purposes of the statute. Litchfield apparently believes that she does not have to show substantial similarity to show that *E.T.* is a derivative work.

Litchfield cites no authority to support this novel proposition. The little available authority suggests that a work is not derivative unless it has been substantially copied from the prior work. *See Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F. Supp. 844, 849 (S.D.N.Y. 1982), *rev'd on other grounds*, 720 F.2d 733 (2d Cir. 1983, *cert. granted sub nom, Mills Music, Inc. v. Snyder*, 104 S.Ct. 1676 (1984); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); 1 M. Nimmer, *The Law of Copyright*, § 3.01 at 3-3 (1983 ed.).

We have stated that "[a] work will be considered a derivative work *only if it would be considered an infringing work if* the material which it has derived from a prior work had been taken without the consent of a copyright proprietor of such prior work." *United States v. Taxe*, 540 F.2d 961, 965 n.2 (9th Cir. 1976) (emphasis added).

To prove infringement, one must show substantial similarity. *See v. Durang*, 711 F.2d at 143, *Krofft*, 562 F.2d at 1172. Litchfield's arguments that section 106(2) radically altered the protection afforded by the law of copyright are frivolous.

D. *LANHAM ACT VIOLATION*

The district court dismissed Litchfield's allegations that defendants violated section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Dismissal for failure to state a claim is proper only when it appears to a certainty that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Rae v. Union Bank*, 725 F.2d 478, 479 (9th Cir. 1984).

Section 43(a) makes a person liable for using a false description of origin in connection with any goods and services put into commerce. 15 U.S.C. § 1125(a). We have held that an actor may state a claim for "reverse passing off" under the Act when a motion picture is mislabeled to mask his contribution. *Smith v. Montoro*, 648 F.2d 602, 605-07 (9th Cir. 1981). Reverse passing off occurs when a "wrongdoer removes the name or trademark on another party's product and sells that product under a name chosen by the wrongdoer." *Id.* at 605.

Litchfield's claim is meritless, however, in light of our holding that there is no substantial similarity between *Lokey* and *E.T. See Warner Brothers v. American Broadcasting Companies*, 720 F.2d 231, 246 (2d Cir. 1983). We have not yet decided whether the reverse passing off doctrine defined in *Smith* extends to cases of substantial similarity or is limited to bodily appropriation. *See Kramer International, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1064 (9th Cir. 1981). In either case, without substantial similarity there can be

no claim for reverse passing off under section 43(a). *Warner Brothers*, 720 F.2d at 246-47.

E. *STATE CLAIMS*

The district court dismissed plaintiff's state claims for unfair competition and misrepresentation. In so far as these state claims are restatements of the copyright infringement claims, they are preempted by federal copyright law. *Mention v. Gessell*, 714 F.2d 87, 90 (9th Cir. 1983). Federal law preempts common law copyright claims undertaken after January 1, 1978. *Id.* Plaintiff did not allege or offer to prove that the copying took place before January 1978.

The dismissal of the pendent state claims of breach of implied-in-fact contract and breach of confidence was proper because all federal claims were dismissed prior to trial. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Jason v. Fonda*, 698 F.2d at 967.

CONCLUSION:

The summary judgment was proper because no reasonable jury could conclude that *Lokey* and *E.T.* were substantially similar in their ideas and expression. The district court properly dismissed the other claims.

As is too often the case, Litchfield's action was premised "partly upon a wholly erroneous understanding of the extent of copyright protection; and partly upon that obsessive conviction, so common among authors and composers, that all similarities between their works and any others which appear later must inevitably be ascribed to plagarism." *Dellar v. Samuel Goldwyn, Inc.*, 150 F.2d 6212 (2d Cir. 1945).

AFFIRMED.

APPENDIX "B"

A9

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LISA LITCHFIELD, Plaintiff, vs. STEVEN SPIELBERG; MCA INC., a corporation; UNIVERSAL CITY STUDIOS, INC., a corporation; EXTRATERRESTRIAL PRODUCTIONS, a California limited partnership; KATHLEEN KENNEDY, NED TANEN, and MELISSA MATHISON, individuals, Defendants.	No. CV 82-3867-CHH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following Findings of Fact and Conclusions of Law, for purposes of this motion only, in support of the Order granting summary judgment to defendants on the First, Fourth, and Fifth Causes of Action.

FINDINGS OF FACT

Plaintiff Lisa Litchfield is the author of a one-act play entitled "Lokey from Maldemar." Litchfield wrote the play in 1978, and public performances were given in Los Angeles in September 1978. Subsequently, she submitted a copy of "Lokey" to defendant Universal City Studios, Inc., in the hope that the work would be purchased for purposes of developing a motion picture. These aspirations were disappointed, however, when Universal rejected "Lokey" as unsuitable for film treatment in October 1979. Nonetheless, plaintiff continued her efforts to market the work, adapting a "screenplay outline" of "Lokey" in 1980 from the 1978 theatrical version. Despite repeated efforts to find a receptive buyer for her works, plaintiff failed to find success in Hollywood.

As originally developed in 1978, "Lokey" was a musical play about the adventures of two aliens, Fudinkle and Lokey, who are temporarily stranded on Earth when their spacecraft is immobilized by gravity. After landing near the North Pole, the aliens meet Lisa Marie, her younger brother Michael, and their father, a scientist stationed at the Sorenson Research Center at the North Pole. After temporarily detaining the children with an energy field, the aliens quickly learn English and are invited home by Lisa Marie to meete her father. At the cabin, Lokey demonstrates his extraordinary extra-terrestrial powers by psychokinetically taking a gun away from the father; reviving the father from a heart attack; projecting a map of the Earth on the cabin wall through mind power; and revealing his own destiny as a future ruler of his planet. Lisa Marie demonstrates her own terrestrial charms, teaching Lokey to kiss and inducing him to promise to send "mind pictures" to her after the aliens' departure. Fudinkle and Lokey then travel to a beach in Japan, where they capsize a fishing boat filled with porpoise hunters. Next, the aliens travel to the Andes Mountains, where they meet Tollie Marx, a prophetic witch. Finally, all of the characters appear on the edge of the Pacific Ocean, where the aliens bid the humans farewell as they return to their ship.

On June 11, 1982, the defendants' film "E.T. -- The Extra-terrestrial" opened at commercial movie theaters. "E.T." is the story of a small alien accidentally left behind when his fellow explorers are forced to hastily leave Earth. "E.T." is lured, by hunger and curiosity, into the California suburban home of 10-year-old Elliot, his brother and sister, and their mother. During the following days, E.T. learns a few words of English; discovers television, beer, and other appurtenances of contemporary American life; and constructs a transmitter to "phone home." The children, in turn, learn that E.T. possesses unearthly powers: E.T. levitates objects through psychokinesis; heals a small cut with his glowing finger; revives a wilted flower; and establishes a psycho-physical empathy with Elliot. Yet E.T.'s powers are not total; as time passes, E.T. gradually deteriorates. After an apparently unsuccessful attempt to contact his people, E.T. is captured by the scientific investigators who have stalked him since he was left behind by his spaceship. Following his capture E.T. appears to have expired, but he revives when he senses that his people are returning for him. A chase ensues, and the film concludes with E.T. bidding farewell to earthling friends and returning home.

CONCLUSIONS OF LAW

To establish copyright infringement, plaintiff must prove three elements: (1) ownership of copyright; (2) access to the copyrighted

work; and (3) "substantial similarity" between the copyrighted work and the defendants' work. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977) *("Krofft")*. For purposes of this motion, defendants admit plaintiff's ownership of the copyright to the 1978 and 1980 versions of "Lokey from Maldemar" and concede that they had access to these works.[1] The single issue presented on this motion concerns the existence of "substantial similarity" between the works.

Defendants are entitled to summary judgment if they demonstrate that "there is no genuine issue as to any material fact and that [they are] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a summary judgment motion, the Court must closely examine the "inherently peculiar" facts presented by each case, *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 696 F.2d 689, 692 n.6 (9th Cir. 1983). If Rule 56 is to be of any effect, summary judgment must be available to put "'a swift end to meritless litigation' and to avoid lengthy and costly trials." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

The determination of whether defendants' work is substantially similar to plaintiff's turns upon two tests: (1) an "extrinsic" test, turning upon objective criteria such as the "subject matter" and "setting for the subject"; and (2) an "intrinsic" test, based upon the subjective "response of the ordinary reasonable person." *Krofft, supra*, 562 F.2d at 1164. The *Krofft* formulation is analogous to the traditional "idea-expression" dichotomy set forth in previous copyright cases, *e.g., Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). A comparison of plaintiff's and defendants' works reveals that there is no substantial similarity under either the extrinsic or intrinsic tests.

In this case, the extrinsic characteristics of the works include the plot, themes, dialogue, mood, setting, pace, and sequence. *Jason v. Fonda*, 526 F. Supp. 774, 777 (C.D. Cal. 1981), *aff'd*, 698 F. 2d 966 (9th Cir. 1982). A close examination of these criteria reveals vast differences between the two works. The plots are similar only at a general level: aliens are stranded on earth, meet earthlings, demonstrate "extra-terrestrial" powers such as levitation and telepathy, are pursued by authoritarian characters, and finally bid their earthling friends farewell as they return to their homes. Beyond these generalized similarities, for which plaintiff cannot claim copyright protection, *see Jason v. Fonda, supra*, the plots and sequences of the works are dissimilar. These differences are accentuated when themes, mood, and character development are

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[1] Plaintiff does not allege, nor do defendants admit, that they ever viewed or had access to the 1978 theatrical performances of "Lokey."

considered. In her "Critique" of the screenplay version, plaintiff describes her work as a "social satire" designed to illustrate the "disunity of man so divided by egotism and all its manifestations of fear and hate." "E.T.", does not purport to raise and resolve diverse moral and ethical questions, nor does it purport to employ the overt and complex symbolism found in plaintiff's work. Setting and dialogue are similarly diverse, with no apparent similarity between "E.T." and either version of "Lokey." The lack of similarity between the works in this case is at least as great as in cases such as *Giangrasso v. CBS*, 534 F. Supp. 472 (E.D.N.Y. 1982); *Bevan v. CBS*, 329 F. Supp. 601 (S.D.N.Y. 1971); *Columbia v. Embassy*, Copyright L. Rep. (CCH) ¶ 25,440, 8 Media L. Rep. (BNA) 1948 (C.D. Cal. 1982); and *Miller v. CBS*, 209 U.S.P.Q. (BNA) 502, 6 Media L. Rep. (BNA) 1859 (C.D. Cal. 1980).

There is also no basis for a claim that the character E.T. infringes plaintiff's copyright. Neither Lokey nor Fudinkle was the focus of "Lokey," nor were they "distinctively delineated" as required to warrant copyright protection. *See, e.g., Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Warner Bros., Inc. v. Film Ventures Int'l*, 403 F. Supp. 522 (C.D. Cal. 1975). Lokey was described in the 1978 play as a bald, egg-headed, gray-green, five-foot tall boy, and in the 1980 screenplay as a "tall, gray-hued skin, hairless alien...." Fudinkle is described as a giant firefly in 1978, as a three-foot talking bug with a flashing phosphorus tail in 1980. None of these descriptions is complete or distinctive.

Even if the similarities between the ideas of "Lokey" and "E.T." were found to be sufficiently substantial to satisfy the extrinsic test, plaintiff would still be required to satisfy the "intrinsic" test to sustain her claim at trial. As defined in *Krofft*, intrinsic similarity is determined by the subjective response of an audience to the work, rather than analytic dissection and comparison. Intrinsic similarity does not require proof of exact repetition or reproduction; rather, it may be shown if the defendants' work captures the "total concept and feel" of the plaintiff's composition. *See Krofft, supra*, 562 F.2d at 1167. Defendants have, in this case, satisfied their burden of demonstrating an absence of any similarities in the expression of ideas in "Lokey" and "E.T." No reasonable jury could conclude that "E.T." and "Lokey" are substantially similar under an intrinsic test. *See, e.g., Warner Bros., Inc. v. American Broadcasting Co.*, 530 F. Supp. 1187 (S.D.N.Y. 1982).

Having decided that defendants are entitled to partial summary judgment on the issue of copyright infringement between "Lokey" and the "E.T." movie, two further issues may be resolved. First, plaintiff's first cause of action for copyright infringement alleges infringement not only by the film version of "E.T." but also by

defendants' merchandising of derivitive products. Although defendants have moved for summary judgment only on the claim directed against the film, there does not appear to be any basis for pursuing the derivitive claims once the film is held to be non-infringing. Accordingly, defendants are entitled to summary judgment on the first cause of action in its entirety. Second, the Complaint also alleges two pendent claims for breach of implied-in-fact contract and breach of confidence. Because the Court has discretion to dismiss pendent state claims when the federal claim is dismissed prior to trial, *see Jason v. Fonda, supra*, 698 F.2d at 967, these pendent claims will be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h) (3).

Dated: June 10, 1983.

Cynthia Holcomb Hall
United States District Judge
(Original signed)

APPENDIX "C"

A15

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LISA LITCHFIELD, Plaintiff-Appellant, vs. STEVEN SPIELBERG, MCA INC.; UNIVERSAL CITY STUDIOS, INC.; EXTRA-TERRESTRIAL PRODUCTIONS; KATHLEEN KENNEDY; NED TANEN; and MELISSA MATHISON, Defendants-Appellees.	)	No. 83-6045 CV No. 82-3867 CHH O R D E R

Before: WRIGHT, FERGUSON, and REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Ferguson and Reinhardt have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 8306 Wilshire Boulevard, Beverly Hills, California 90211; that on December 26, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543
(Original and 40 copies)

Louis P. Petrich
Youngman, Hungate & Leopold
2049 Century Park East, Suite 3110
Los Angeles, California 90067
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 26, 1984, at Los Angeles, California.

Sheri R. Masser
(Original signed)